91-1577

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

TONY AND SUSAN ALAMO FOUNDATION, TONY ALAMO, SUSAN ALAMO, AND LARRY LAROCHE,

Petitioners,

vs.

LYNN MARTIN, SECRETARY OF LABOR,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the threshold burden of proof enunciated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946) required of the Secretary of Labor on behalf of the employee in an action for back wages is satisfied simply by the claim of the Secretary that back wages are due.

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OPINIONS DELIVERED BELOW

The subject Order and Amended Judgment of the United States District Court for the Western District of Arkansas are printed in their entirety in the Appendix attached hereto at pages App. 1-3. The opinion of the United States Court of Appeals, Eighth Circuit, is reported at 952 F. 2d 1050 (8th Cir. 1992), and said opinion and Judgment of the Court of Appeals are printed in their entirety in the Appendix attached hereto at pages App. 4-10.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The opinion of the United States Court of Appeals for the Eighth Circuit was entered on January 3, 1992 (see Appendix, pages App. 4-10). This petition is being filed within ninety (90) days of that date, in accordance with Rule 13 of the Rules of the Supreme Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1254(1) and 2101.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 1291

29 U.S.C. Section 201

29 U.S.C. Section 203(m)

29 U.S.C. Section 206(a)(1)

29 U.S.C. Section 207(a)(1)

29 U.S.C. Section 217

(Only citations for the above list of statutes are provided at this point; their pertinent text is set forth in the following Appendix.)

STATEMENT OF THE CASE

On December 19, 1977, the Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 217, to enjoin the Tony and Susan Alamo Foundation, Tony Alamo,

Susan Alamo, and Larry LaRoche[1] (collectively, "Foundation") from violating the Act's minimum wage, overtime and recordkeeping requirements and from withholding back wages allegedly owed to over 300 individuals (referred to throughout the proceedings as "associates").

The Tony and Susan Alamo Foundation is a nonprofit religious organization. The Foundation does not solicit contributions from the public, but derives its income largely from the operation of commercial businesses staffed by the Foundation's "associates," most of whom were drug addicts, derelicts, or criminals before their rehabilitation by the Foundation. These workers received no cash salaries, but the Foundation provides them with food, clothing, shelter, and other benefits.

Following evidentiary hearings on April 28-30, 1982, and September 8-9, 1982, the United States District Court for the Western District of Arkansas rendered its decision, holding the Foundation liable for violating the Act and enjoining it from violating the Act in the future. See, *Donovan v. Tony and Susan Alamo Foundation*, 567 F. Supp. 556 (W.D. Ark. 1982). The District Court awarded back wages to outside workers who were not associates of the Foundation, but did not make awards for those associates who testified or for any other nontestifying associates. Instead, the District Court ordered the Secretary to mail a notice of the court's decision to each associate and advise any associate desiring to claim back wages to submit a claim in the form of an affidavit within 45 days of the

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[1] Susan Alamo died in 1982, and Larry LaRoche was subsequently dismissed from this action.

mailing of the notice by the Secretary. The District Court ordered the Secretary to submit a proposed finding of back wages due each associate based on the affidavits, less the applicable Section 3(m) benefits found due.[2] The District Court further concluded that Section 3(m) benefits in the following amounts should offset back wages: $2,700.36 per associate in 1976, $2,088.72 per associate in 1977, $2,703.60 per associate in 1978, $2,887.20 per associate in 1979, $3,239.04 per associate in 1980 and $919.14 per associate in 1981. 567 F. Supp at 566-70.

Both parties appealed to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the District Court as to liability, but reversed and remanded as to the back wage award. See, *Donovan v. Tony and Susan Alamo Foundation*, 722 F. 2d 397 (8th Cir. 1983). The Court of Appeals held that the District Court had improperly placed on the employees the burden of initiating proceedings to obtain payment of back wages:

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[2] Sections 6 and 7 of the FLSA, 29 U.S.C. Sections 206 and 207, require that an employer pay employees covered by the Act a minimum hourly wage and overtime compensation at a premium rate for hours worked in excess of 40 per week. These wages must be paid in cash; the sole statutory exception to this obligation is provided in Section 3(m) of the Act, 29 U.S.C. 203(m), which allows an employer to count as wages paid the "reasonable cost" to an employer of providing an employee with board, lodging, or other facilities, if such items are "customarily furnished" by the employer to his employees. 29 C.F.R. 531.28; *Brennan v. Heard*, 491 F. 2d 1, 3 (5th Cir. 1974); *Brennan v. Veterans Cleaning Service, Inc.*, 482 F. 2d 1362, 1369 (5th Cir. 1978); *Shultz v. Hinojosa*, 432 F. 2d 259, 266 (5th Cir. 1970).

> The solution to the problem presented "where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes" is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying the compensation as contemplated by the Fair Labor Standards Act.

722 F. 2d at 404. The case was remanded to the District Court for "determination of the amounts of wages owing, such determination to be based either upon the present record or as supplemented by such additional evidence as the District Court may afford the parties an opportunity to offer [citation omitted]." 722 F. 2d at 405.

On the Foundation's petition challenging the application of the Act to a religious institution and the constitutionality thereof, this Court granted certiorari, ultimately affirming, on April 23, 1985, the Court of Appeals' decision. See, *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985).

In response to the remand of the Court of Appeals, on September 11, 1984, the District Court entered its *Memorandum and Order* wherein it made the following finding:

> [T]he Secretary argued that in 1976 there were 316 "associates" of the Foundation, and this court should award an amount which will

> compensate all 316 for sixty hours work per week. *During the course of the hearings, this court repeatedly told the Secretary's attorneys that there was no evidentiary basis for concluding all associates were full time employees of the commercial businesses.*
>
> . . .
>
> This court did not accept that argument. Under the evidence, the term "associate" simply cannot be used interchangeably with the term "employee" under the Act. (emphasis added)

On November 26, 1986, the District Court entered a judgment enjoining the Foundation from violating the minimum wage, overtime and recordkeeping provisions of the Act and ordering payment of back wages and prejudgment interest to ten testifying associates.[3] The 1986 judgment specifically identified Section 3(m) deductions in the amounts found by the District Court in its 1982 decision. As to the nontestifying associates, the District Court denied the Secretary's request for a back wage award and dismissed such claims without prejudice. A back wage award was granted only for various testifying associates. The District Court concluded that, as to the nontestifying associates, in spite of their denials that they were entitled to any compensation for their work, the evidence supported the inference that they (the testifying associates) were entitled to compensation for 40 hours per week from January 1, 1976, until the injunction was

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[3] The 1986 judgment incorporated a Memorandum and Order entered by the District Court on September 11, 1984, while the Foundation's petition for certiorari was pending before this Court.

entered in the case. The District Court dismissed without prejudice the Secretary's claims on behalf of the approximately 300 associates who did not testify. Both parties again appealed to the Court of Appeals.

On March 28, 1988, the Court of Appeals affirmed the District Court's award of back wages and again remanded the case for the District Court to "estimate and fashion a reasonable remedy that restores as fully as possible for all the employees covered by the FLSA who were improperly denied compensation, regardless of the lack of records." *Brock v. Tony and Susan Alamo Foundation*, 842 F. 2d 1018 (8th Cir. 1988). On May 30, 1989, the District Court on remand entered a partial judgment, awarding back wages and prejudgment interest to two testifying former associates and one outside worker and enjoining the Foundation from violating the relevant portions of the FLSA with respect to its employees. Once again as to the nontestifying associates, District Court (finding no support in the record) refused to enter a back wage award. This partial judgment was appealed by the Foundation and affirmed by the Court of Appeals on September 25, 1990. See, *Dole v. Tony and Susan Alamo Foundation*, 915 F. 2d 349 (8th Cir. 1990). The Court of Appeals again remanded the case for entry of a back wage award for the nontestifying associates.

While the appeal of the District Court's Pretrial Judgment to the Court of Appeals was pending, further proceedings were being held at the District Court level for the purpose of establishing the amounts owed the various nontestifying associates. By letter of June 1, 1988, the Secretary submitted that the District Court need not reopen the record to hear additional evidence on the

issue of the amount of unpaid wages due to each associate of the Foundation who did not testify. (Previously, the Foundation had moved the District Court to present additional evidence, however, the motion was denied.) Instead, the Secretary submitted that the court could make findings of the amount of unpaid wages due to each non-testifying associate in the same way as it did with respect to testifying associates Ann Elmore, Larry LaRoche and Edward Mick. In this regard, the Secretary noted that, based on a forty-hour work week, the court had earlier found that these testifying associates were due $1,875.64 for 1976, $2,695.28 for 1977, $2,808.40 for 1978, $3,144.80 for 1979, $3,208.96 for 1980 and $822.86 for 1981.

In an effort to determine the amount, if any, of the back wages due the nontestifying associates, the Secretary submitted a series of interrogatories requesting the identity of each of the associates who worked in the commercial enterprises of the Foundation and the amount and type of work performed by each associate. The number of associates had previously been established as follows: 316 associates in 1976, 385 associates in 1977, 355 associates in 1978, 347 associates in 1979, 337 associates in 1980 and 314 associates in 1981. The number of total associates is derived from the district court's first decision. 567 F. Supp. 565, 567, 568, and 569. These numbers were based on schedules provided to the Secretary by the Foundation.

By letter of July 7, 1988, the court allowed the Secretary to propound the interrogatories suggested. The Foundation responded to the Secretary's interrogatories with a list of associates and hours worked for the years in

question, 1976-1981. The Foundation's answers to these interrogatories identified the following number of associates engaged in commercial activities: 189 associates in 1976, 229 associates in 1977, 229 associates in 1978, 252 associates in 1979, 272 associates in 1980 and 205 associates in 1981. The information supplied in these answers noted that for 1976 the associates worked 19-24 hours per week; for 1977, 5-23 hours per week; for 1978, 15-18 hours per week; for 1979, 15-20 hours per week; for 1980, 0-27 hours per week; and for 1981, 8-20 hours per week.

On July 30, 1990, the Secretary filed with the District Court a Motion for Entry of Judgment, submitting that a judgment should be entered (based upon a forty-hour work week) restraining the withholding of back wages to each of the remaining known or unknown nontestifying associates in the amount of $1,875.64 for 1976, $2,695.28 for 1977, $2,808.40 for 1978, $3,144.80 for 1979, $3,208.96 for 1980 and $822.86 for 1981. In response to the Secretary's Motion for Entry of Judgment, the Foundation stated that it had supplied the names of all individuals defined as employees under the FLSA, and that it was not required under the Act to identify associates who were not involved in the commercial activities of the Foundation, i.e., those associates who attended services but did not work for the Foundation. Furthermore, the Foundation asserted that calculations for back wages should be based upon the information provided in its answers to interrogatories.

In its Order of August 22, 1990, the District Court agreed with the Foundation that the judgment need only reflect an award for each associate identified and

acknowledged as having worked in the commercial businesses of the Foundation and granted the Secretary's Motion for Entry of Judgment only in part. The District Court directed the Secretary to prepare and submit to the court a proposed judgment reflecting an award for each associate *identified* by the Foundation.

By letter dated September 13, 1990, the Secretary submitted a proposed judgment to the District Court; and by letter dated September 28, 1990, the Foundation objected that the Secretary had not used the hours that the Foundation claimed its associates had worked and that the Secretary had not given the associates credit for benefits, as determined by the district court in its 1982 decision, 567 F. Supp. at 566-570. By Order entered on October 9, 1990, the court directed that the proposed judgment be revised in light of the Foundation's comments.

On October 7, 1990, the Secretary filed a motion for reconsideration, pointing out that the Foundation already had been given the credits for benefits as determined in the District Court's 1982 decision and that it was too late for the Foundation to suggest an alternative to the computational approach advanced by the Secretary. On November 5, 1990, the District Court denied the Secretary's motion for reconsideration.

On December 5, 1990, the Secretary advised the District Court that the remaining associates were not due any unpaid wages if the Foundation were given "double credits" for board, lodging and other facilities. Despite the Secretary's strong objections to this course, the District Court, on January 9, 1991, entered an Order, stating

that the Secretary had advised the court that no additional amounts were due and dismissing the entire action "with prejudice."[4]

The Secretary appealed to the United States Court of Appeals for the District Court's January 9, 1991, Order.

The Court of Appeals, in a decision dated January 3, 1992 (952 F. 2d 1050 (8th Cir. 1992)), reversed the District Court's Order and remanded the action to the District Court "to enter an order awarding the nontestifying employees back pay in conformity with the Secretary's proposed judgment." 952 F. 2d at 1052.

ARGUMENT AND REASON FOR ALLOWANCE OF WRIT

The Court of Appeals for the Eighth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. Furthermore, the Court of Appeals has departed from the holding of this Court announced in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946).

On December 19, 1977, the Secretary of Labor initiated this action against the Petitioners, The Tony and Susan Alamo Foundation, Tony Alamo, and others, for alleged violations of Sections 6, 7, 11, and 15 of the Fair Labor Standards Act (29 U.S.C. Sections 206, 207, 211, and 215).

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[4] On April 2, 1991, the district court modified that dismissal by ordering that the dismissal apply only to the claims of the nontestifying associates of the Foundation and not to the earlier injunctions entered in the case.

Throughout this proceeding the Secretary has taken the position that each adult associate of the Foundation is an "employee" as defined by the Fair Labor Standards Act engaged in fulltime employment for 52 weeks per year. The Secretary has consistently contended that all of the nontestifying associates are entitled to a back wage award based upon this theory. The Secretary's position finds its "basis" only in the testimony of the Secretary's compliance officer at the evidentiary hearing held on April 28-30, 1982. The Secretary's position or calculation, which would initially result in a back wage award of over fifteen million dollars, was presented to the District Court by the testimony of the compliance officer. These calculations of a back wage award were simply conclusory yearly figures based on assumption only. The presentation of the Secretary's position to the District Court went as follows:

> Secretary's Counsel: Using the minimum wage of $2.30 an hour and *assuming* the Foundation had three hundred uncompensated inside workers who were employed for sixty hours a week for fifty-two weeks, can you tell us how much minimum wages and compensation are due?
>
> [Objection of defense counsel omitted.]
>
> Secretary's Counsel: Can you tell us how much pay at the minimum wage and overtime is due for 1977?
>
> Labor Compliance Officer: $2,511,600.00 (Trial Transcript ("Tr.") Vol. III, p. 63). (emphasis added)

This line of questioning, based upon the assumption that each associate worked a 60-hour work week for 52 weeks per year, continued for the years 1978, 1979, 1980, and a portion of 1981 (Tr. Vol. III, pp. 63-65). The Secretary's *assumption* that every associate of the Foundation worked in commercial enterprises for 60 hours a week, 52 weeks a year, finds no support in the evidence, as has been noted by the District Court in its Orders and Judgment entered in this case.

On numerous occasions, and despite the Court of Appeals repeated remands, the District Court has consistently rejected the Secretary's calculations. As stated by the District Court in its original decision of 1982:

> The Secretary has taken the position that an appropriate inference to be drawn from the evidence, in absence of accurate records, is that all 300 associates worked 10 hours per day, 6 days per week.
>
> . . .
>
> *It is difficult to draw inferences with any degree of certainty, from the testimony presented, as to the number of associates working in commercial businesses or hours they worked.*
>
> First, *there is no basis for concluding, as the Secretary suggests, that all 300 of the associates worked in the Foundation's commercial businesses.* To the contrary, the evidence reflects that the associates have constructed, decorated and furnished a number of residences, an apartment building, a church, and various other structures used by the Foundation and its associates for non-commercial purposes. The labor for much

> of this construction and the continuing maintenance of the structures was furnished by the associates. As previously mentioned, some associates work at the Foundation in non-commercial jobs, such as babysitting at the nursery, cooking for the other associates, etc. Furthermore, the Foundation produces a television show which obviously requires some non-commercial work time; some associates "witness" on the streets, in hospitals, jails and other places; and some help organize new churches. Additionally, some associates are employees of businesses other than the Foundation's and simply turn their paychecks over to the Foundation. *In any event, while it is difficult to reach any reasonably accurate conclusion as to how many associates work in the commercial businesses at any particular time, it is not reasonable to conclude that all of the adult associates are working in the commercial businesses, or, that the ones who do work in the commercial businesses do so on the regular basis suggested by the Secretary. Donovan v. Tony and Susan Alamo Foundation*, 567 F. Supp. 556, 562-563 (W.D. Ark. 1982). (emphasis added)

No other evidence was presented by the Secretary on the issue of back wages due the nontestifying associates after the District Court's aforesaid ruling.

Again, in 1984, when this case was before the District Court on remand from the Court of Appeals for the Eighth Circuit, the District Court refused to enter a back wage award for the nontestifying employees. The District Court, in its *Memorandum and Order* dated September 10, 1984, made the following declaration:

> *This Court does not believe . . . that there is credible evidence upon which to base an inference as*

> *to the identity of those associates [who performed work], the time period which they worked, or the compensation they are due. Absent some reasonable basis in the evidence for such findings, this court is not willing to award the $15,000,000 or so in benefits sought by the Secretary.* (emphasis added)

Again, in 1989 and 1991, the District Court dismissed the Secretary's claim for a multimillion dollar back wage award for the nontestifying associates. Notwithstanding the obvious lack of evidence, the Court of Appeals has once again remanded this case to the District Court. But this time, and without further evidence being presented, the remand specifically directs the District Court "to enter an order awarding the nontestifying employees back pay in conformity with the Secretary's proposed judgment." *Martin v. Tony and Susan Alamo Foundation*, 952 F. 2d 1050, 1052 (8th Cir. 1992).

The law is clear with respect to the burden of proof required of the Secretary of Labor in an action brought for back wages under the Fair Labor Standards Act. As announced in *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946), the employee or the Secretary on the employee's behalf need only prove a "just and reasonable inference" as to the uncompensated work performed, and once the plaintiff-employee has produced evidence of uncompensated labor, "[t]he burden shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." 328 U.S. at 687-688.

As noted above, the District Court has repeatedly held that there was no evidence presented by the Secretary from which any inferences could be drawn which would justify a back wage award to the nontestifying associates. It has been found by the District Court that the initial burden of proof required of the Secretary in *Mt. Clemens Pottery* has not been met. Yet, the Court of Appeals is directing the District Court to enter an order awarding the nontestifying employees back pay "in conformity with the Secretary's proposed judgment."

The Court of Appeals seems to find support in its position by concluding that the Foundation has not maintained accurate records. But, it was this exact "situation" which resulted in this Court's holding in *Anderson v. Mt. Clemens Pottery Co., supra*. The threshold burden of proof is required of the Secretary even "where the employer's records are inaccurate or inadequate." 328 U.S. at 687.

The difficulty which the District Court has experienced in trying to draw an inference as to the number of associates working or the number of hours they worked first became evident in its "Remedy" provisions set forth in its aforesaid *Memorandum and Order* dated December 10, 1982. See, *Donovan v. Tony and Susan Alamo Foundation*, 567 F. Supp. 556, 576 (W.D. Ark. 1982). The District Court ordered:

> [That] "all persons who have been associates of the foundation or who have worked at any of the businesses" . . . [would be mailed a notice which would] "advise any associate who desires to submit a claim for back wages to submit a claim in the form of an affidavit within 45 days of the mailing of the notice by the

> Secretary. . . . Within 20 days after the deadline for submitting claims, the Secretary shall submit a proposed finding of back wages due each claimant based upon the affidavits, less applicable benefits. . . . The defendants shall have 20 days thereafter in which to respond to the claims submitted." 567 F. Supp. at 576.

While it is true that the District Court's "Remedy" was reversed by the Court of Appeals (*Donovan v. Tony and Susan Alamo Foundation*, 722 F. 2d 397 (8th Cir. 1983)), this part of the District Court's *Memorandum and Order* demonstrates the lack of proof presented by the Secretary on the questions of the number of associates who worked in commercial business and the number of hours worked. The "Remedy" was the "best [the Court] could [do] in assessing damages." *Mitchell v. Riley*, 296 F. 2d 614, 616 (5th Cir. 1961). Since the entry of the District Court's said 1982 *Memorandum and Order*, no testimony or evidence has been presented relative to the nontestifying employees.

As stated in *Anderson v. Mt. Clemens Pottery, supra*, it is incumbent on the employee or Secretary to prove "that he [the employee] has in fact performed work for which he was improperly compensated" and to produce "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." (328 U.S. at 688.)

To even suggest that the Secretary presented "sufficient evidence to show the amount and extent of the nontestifying associates' uncompensated work as a matter of just and reasonable inference" is to contradict the various holdings of the District Court. Yet, the Court of

Appeals insists upon the entry of a back wage award for these alleged employees, regardless of the lack of proof.

It is noted in the Court of Appeals' latest decision that the Secretary has presented a case of "pattern or practice" violations of the Act. This not only runs contrary to the District Court's interpretation of the evidence, but it completely ignores the testimony of the three representative associates.

Pursuant to the District Court's pretrial order of March 20, 1982,[5] (Tr. Vol. I, pp. 9-11), the Foundation called three associates to testify concerning their relationship with the Foundation, with the understanding and agreement that their testimony would be representative of all the associates of the Foundation. The Secretary of Labor was given the opportunity to call any associate who would testify differently from the three representative associates. The three who testified in such representative capacity were Bill Levy, Ann Elmore, and Edward Mick.

The first representative associate to testify was Bill Levy (Trial Transcript ("Tr") Vol. II, pp. 70-117). During the Secretary's examination of Mr. Levy, it was shown that he worked on the Foundation's hog farm whenever

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[5] THE COURT: Why don't you pick out two or three of them and we will assume that if the ones whose statements were furnished testified on that issue they would testify the same way. How will that be Mr. Fitz? MR. FITZ: I don't suppose there would be any problem with that, Your Honor. THE COURT: Mr. Fitz, if you find some among that group you think would testify to the contrary, of course, you are free to call them (Tr. Vol. I, p. 9).

he wanted to help out (Tr. Vol. II, p. 107). There were no set hours for his work at the hog farm as he worked only when he wanted (Tr. Vol. II, pp. 109, 110). It was also shown during the Secretary's examination of Mr. Levy that he worked on jobs unconnected with the Foundation; such as work for a local factory (i.e., Flanders Factory in Fort Smith, Arkansas (Tr. Vol. II, p. 111), and such as work for mason or tree planting subcontractors (Tr. Vol. II, pp. 112-117).)

The second representative associate to testify was Ann Elmore (Tr. Vol. II, pp. 118-154). During direct examination, Mrs. Elmore described her activities during the first few years she was associated with the Foundation, as follows:

> [T]he first four and a half or five years at the Foundation, I did nothing but read the Bible and pray. I'd go out in the streets and witness and testify. That was all I did the first five years (Tr. Vol. II, pp. 127, 128).

Mrs. Elmore also stated during direct examination: "I volunteer my time waitressing in our restaurant. And I loved working up there, because I was a witness for the Lord (Tr. Vol. II, pp. 140, 141)." During the Secretary's cross-examination of Mrs. Elmore, no question was asked about the nature of her work in the Foundation or the number of hours she spent working in what the Secretary labels the Foundation's "commercial" enterprises.

The third representative associate to testify was Ed Mick (Tr. Vol. II, pp. 155-217). During direct examination, Mr. Mick basically stated that he witnessed and testified,

and that he helped out in other activities of the Foundation when he was needed (Tr. Vol. II, p. 65). During the Secretary's cross-examination, Mr. Mick was only asked about his outside jobs, that is, those jobs which were unconnected with the Foundation (Vol. II, pp. 194-195).

The Secretary completely failed to question any of the three representative associates about the type of work in which they were engaged for the Foundation or the number of hours spent in such work. In view of the evidence presented by the representative associates, it is difficult to see any "pattern or practice." The Secretary simply requested the District Court to enter a judgment, *based on assumptions only*, in an amount of over fifteen million dollars ($15,000,000.00).

Appropriately, and despite previous remands from the Court of Appeals, the District Court has continued to refuse to enter a back wage award for the nontestifying employees. Now, however, the District Court is being forced to enter such a judgment as the Court of Appeals is directing the entry of a back wage award "in conformity with the Secretary's proposed judgment."

Not only has the Court of Appeals accepted the Secretary's assumptions and unsupported calculations, but it has rejected the information supplied by the Petitioners to the Secretary in answer to a series of Interrogatories submitted in 1988. The Court of Appeals simply labeled the information and documents produced in response to those interrogatories as "self-serving unsubstantiated approximations." 952 F. 2d at 1052. The information, however, (which took the Foundation months to accumulate and which was based upon all available records and

information relating to the commercial activities of the Foundation) provided (1) the names of the associates who worked in commercial activities, (2) the number of hours each associate worked in such commercial activities for each year in question, and (3) the type of work done by each associate.

The District Court accepted the information provided in these answers to interrogatories as the only credible evidence it had before it on the issue of whether a back wage should be entered; and accordingly, it rejected the Secretary's claim for a back wage award. Unexplicitly, the Court of Appeals has simply discredited this information and has accepted the Secretary's assumption. Yet, the information supplied by the Foundation provided the "most accurate basis possible" at determining the amount of a back wage award, if any. (See, *Dole v. Tony and Susan Alamo Foundation*, 915 F. 2d 349, 351 (8th Cir. 1990).

Given the directive of the Court of Appeals to the District Court and considering the refusal of the Court of Appeals to impose the burden of proof upon the Secretary as announced in *Anderson v. Mt. Clemens, supra,* (other than simply the claim of the Secretary that back wages are due) the Petitioners' only hope for appropriate relief is in this Court's granting their request for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

CONCLUSION

WHEREFORE, petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the decision of the United States Court of Appeals for the Eighth Circuit in Lynn Martin, Secretary of Labor, United States Department of Labor v. Tony and Susan Alamo Foundation, Tony Alamo, Susan Alamo, and Larry LaRoche. In the event that this Petition is granted, petitioners pray that the decision of the Court of Appeals for the Eighth Circuit dated January 3, 1992, be reversed.

Respectfully submitted,

GEAN, GEAN & GEAN
Federal Savings Bank Building
Suite 500, 524 Garrison Avenue
Fort Smith, Arkansas 72901

By Roy Gean III

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ELIZABETH DOLE, Secretary
of Labor, U.S. Department
of Labor — Plaintiff

vs.

TONY AND SUSAN ALAMO FOUNDATION
et al. — Defendants

Civil NO. 77-2183 (Filed Jan. 9, 1991)

ORDER

NOW on this eighth day of January, 1991, comes on for consideration the above-styled cause.

The plaintiff having advised the court that no additional amounts are due, by letter dated December 5, 1990, and filed by the court on December 28, 1990, it is ORDERED that the case be, and it is hereby, dismissed with prejudice.

/s/ Morris S. Arnold
Hon. Morris S. Arnold
United States District Judge

This document entered on
docket in compliance with Rule
58 and 79(a), FRCP
on 1-9-91 by illegible

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

LYNN MARTIN, Secretary
of Labor, United States
Department of Labor — Plaintiff

vs.

TONY AND SUSAN ALAMO FOUNDATION
et al. — Defendants

Civil No. 77-2183 — (Filed Apr. 2, 1991)

ORDER AND AMENDED JUDGMENT

NOW on this first day of April, 1991, comes on for consideration the plaintiff's Motion to Correct Error, filed on March 15, 1991, in the above-styled cause. And no responses were filed.

IT APPEARING to the court that the dismissal ordered entered on January 9, 1991, suggests that the earlier injunctions may have been dismissed, which is not the case, it is ORDERED that the dismissal of the remaining claims in the case applies only as to the nontestifying associates of the defendant Tony and Susan Alamo Foundation. The injunctions earlier entered remain in force. It is FURTHER ORDERED that this Order and Amended Judgment be entered *nunc pro tunc* as of January 9, 1991.

/s/ Morris S. Arnold
Hon. Morris S. Arnold
United States District Judge

App. 3

This document entered on
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on 4-2-91 by MSJ

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

77-2183
No. 91-1465WAFS

Lynn Martin, Secretary of Labor, United States Department of Labor, Appellant, v. Appellees.	* * * * * * * * *	Appeal from the United States District Court for the Western District of Arkansas (Filed Jan. 29, 1992)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

January 3, 1992

A true copy.

ATTEST: /s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-1465WA

Lynn Martin, Secretary of Labor, United States Department of Labor, Appellant, v. Tony and Susan Alamo Foundation; Tony Alamo; Susan Alamo; Larry Larouche, Appellees.	* * * * * * * * * * * * *	Appeal from the United States District Court for the Western District of Arkansas

---

Submitted: September 13, 1991

Filed: January 3, 1992

Before McMILLIAN, FAGG, and WOLLMAN, Circuit Judges.

FAGG, Circuit Judge.

The Secretary of Labor brought this action under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1988), against the Tony and Susan Alamo Foundation, Tony Alamo, Susan Alamo, and Larry LaRouche (collectively the Foundation) to collect backpay owed to the Foundation's employees. In *Brock v. Tony & Susan Alamo Foundation*, 842 F.2d 1018, 1020-21 (8th Cir. 1988), we

remanded this case to the district court to "award benefits to those employees who were improperly denied compensation." On remand the district court rejected the Secretary's proposed judgment, concluded no remaining backpay was owed to the employees, and dismissed the Secretary's claims. We reverse and remand to the district court for further proceedings consistent with this opinion.

The controlling facts in this appeal are quite simple. The Secretary brought this action to collect backpay owed to Foundation employees under the FLSA's minimum wage and overtime compensation provisions. *See* 29 U.S.C. §§ 206-207. The district court enjoined the Foundation from violating the FLSA and awarded backpay to certain employees who testified about the number of hours they worked. The district court acknowledged " '[t]here were . . . other [employees] of the Foundation who performed work for which they were not properly compensated under the [FLSA],' " but declined to award backpay because the Foundation did not keep records of the hours its employees worked and there was no " 'credible evidence [on] which to . . . identi[fy] . . . [the nontestifying employees], the time period which they worked, or the compensation they are due.' " *Brock v. Tony and Susan Alamo Foundation*, 842 F.2d at 1019. We reversed and remanded, holding "that the district court must estimate and fashion a reasonable remedy that restores as fully as possible all the employees covered by the FSLA who were improperly denied compensation, regardless of the lack of records." *Id.* at 1019.

On remand the district court ordered the Secretary to submit a proposed judgment "reflecting an award for

each [employee] identified by the [Foundation] and acknowledged as having worked in the [Foundation's] commercial businesses" based on the backpay awarded earlier to the testifying employees. The Foundation objected to the Secretary's proposed judgment, contending the judgment overstated the amount of backpay the nontestifying employees were entitled to receive. The Foundation argued the nontestifying employees' backpay award should be based on lists the Foundation submitted identifying the nontestifying employees and approximating the number of hours the employees worked. Further, the Foundation contended the judgment did not account for nonsalary benefits the Foundation provided its employees, which could be offset against any backpay the Foundation owed. *See* 29 U.S.C. § 203(m).

Although the district court had earlier found "[t]he Foundation maintain[ed] no records of the hours worked by [its employees] . . . [and] [t]he records which were 'reconstructed' for this litigation do not accurately reflect the hours worked . . . and are of no benefit to the [c]ourt," *Donovan v. Tony & Susan Alamo Foundation*, 567 F. Supp. 556, 562 (W.D. Ark. 1982) (subsequent history omitted), the district court ordered the Secretary to revise the proposed judgment using the foundation's unsubstantiated approximations of the nontestifying employees' hours and subtracting the section 203(m) benefits the Foundation had provided its employees. Because using the Foundation's approximations resulted in no backpay award, the district court dismissed the Secretary's claims.

On appeal the Secretary contends the district court failed to carry out this court's mandate by ordering the

Secretary to base its proposed judgment on the Foundation's unsubstantiated approximations of the nontestifying employees' hours, rather than the Secretary's "pattern or practice" evidence based on the hours the testifying employees worked. We agree. Throughout this litigation the Foundation maintained it had no records of the hours its employees worked. Yet, after this court remanded the case to the district court to fashion a remedy for the nontestifying employees "regardless of the lack of records," 842 F.2d at 1019, the Foundation came forward and "set forth in detail (based upon all available records and information . . .) The names of [employees] . . . , the number of hours the [employees] worked . . . , and the type of work done by each [employee]," Foundation Brief at 3. Recognizing the Foundation's creative record keeping for what it is – a last-ditch attempt to subvert this court's earlier opinion – we reject the Foundation's belated offering.

We issued our opinion on a fully developed record, including the district court's findings that the Foundation maintained no employee work records and the Foundation's "reconstructed" records were inaccurate. Our opinion thus foreclosed the Foundation from attacking the Secretary's "pattern or practice" evidence on remand with self-serving, unsubstantiated approximations of the hours its employees worked. *See Houghton v. McDonnell Douglas Corp.*, 627 F.2d 858, 864-65 (8th Cir. 1980). Based on the record before the court, we held the nontestifying employees were entitled to recover backpay, and "[t]he district court simply could not make a contrary determination." *Id.* at 865. Indeed, the district court was bound to follow this court's opinion directing the district court

to fashion a remedy for the nontestifying employees. *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990).

In remanding this case to the district court we cited *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946), in which the Supreme Court made clear that when an employer has failed to keep proper records, courts should not hesitate to award damages based on the "just and reasonable inference" from the evidence presented, *id.* at 687. We contemplated the district court awarding backpay to the nontestifying employees based on the fairly representative testimony of the testifying employees. *See, e.g., McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988), *cert. denied*, 488 U.S. 1040 (1989); *Donovan v. Bel-Loc Diner, Inc.*, 70 F.2d 1113, 1116 (4th Cir. 1985); *Donovan v. Burger King Corp.*, 672 F.2d 221, 224-25 (1st Cir. 1982). The Foundation "cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had [the Foundation] kept records in accordance with the [FLSA]." *Mt. Clemens Pottery*, 328 U.S. at 688. Thus, the district court committed error in rejecting the Secretary's proposed judgment for the nontestifying employees that was based on the backpay awards made to the testifying employees.

The Secretary also contends the proposed judgment properly credits the Foundation for the section 203(m) benefits the Foundation provided its employees. Having reviewed the record, we agree. The district court made express findings concerning the value of the section 203(m) benefits the Foundation provided its employees. 567 F. Supp. at 563-70. In its proposed order the Secretary relied on the district court's findings and reduced the

employees backpay awards by the value of those benefits. The district court simply overlooked that the Secretary accounted for the section 203(m) benefits in its proposed order.

Accordingly, we reverse the district court's order dismissing the Secretary's claims against the Foundation seeking backpay for the nontestifying employees. We remand this case to the district court to enter an order awarding the nontestifying employees backpay in conformity with the Secretary's proposed judgment.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

28 U.S.C. Section 1291:

Final Decisions of District Courts. The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in section 1292(c) and (d) and 1925 of this title.

29 U.S.C. Section 201:

This chapter may be cited as the "Fair Labor Standards Act of 1983."

29 U.S.C. Section 203(m):

"Wage" paid to any employee includes the reasonable costs, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: Provided, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee: Provided further, That the Secretary is authorized to determine the fair value of such board, lodging, or other

facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to an employee.

29 U.S.C. Section 206(a)(1):

Every employee shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: (1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section.

29 U.S.C. Section 207(a)(1):

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions. (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives

compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. Section 217:

The district courts, . . . shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

(2)

No. 91-1577

FILED
JUN 3 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

TONY AND SUSAN ALAMO FOUNDATION, ET AL.,
PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in ordering the district court to award back wages due to non-testifying employees under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, based on the testimony of representative employees.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1577

TONY AND SUSAN ALAMO FOUNDATION, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5-10) is reported at 952 F.2d 1050. The district court's January 9, 1991 order (Pet. App. 1) and April 2, 1991 order and amended judgment (Pet. App. 2-3) are unreported.

JURISDICTION

The judgment of the court of appeals was filed on January 3, 1992. The petition for a writ of certiorari was filed on April 1, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Tony and Susan Alamo Foundation is a nonprofit religious organization incorporated under the laws of California. *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 292 (1985).[1] Petitioner Tony Alamo, who is President of the Foundation, actively supervises its operations.[2] During the time period relevant to this case, the Foundation operated numerous commercial ventures, including service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a motel, and a candy manufacturing and distribution company. 471 U.S. at 292. These businesses were staffed primarily by the Foundation's approximately 300 "associates," who received no cash salaries but were provided with food, shelter and other necessities by the Foundation. The Foundation failed to maintain any "records of the hours worked by associates in its commercial businesses." *Donovan* v. *Tony & Susan Alamo Found.*, 567 F. Supp. 556, 562 (W.D. Ark. 1982).

2. The Secretary of Labor brought this action under Section 17 of the FLSA, 29 U.S.C. 217, to enjoin petitioners from violating the Act's minimum wage, overtime and record-keeping requirements and to collect back wages owed to the Foundation's employees.

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[1] The Eighth Circuit's most recent decision, which is reproduced in the appendix to petitioners' brief (Pet. App. 5-10), contains only an abbreviated discussion of the facts. Therefore, we refer to earlier decisions in this case, including unpublished district court decisions attached as an appendix to this brief and a decision of this Court.

[2] Susan Alamo and Larry LaRouche are no longer parties to this litigation. *Brock* v. *Tony & Susan Alamo Found.*, 842 F.2d 1018, 1019 n.1 (8th Cir. 1988).

Pet. App. 5-6. On December 13, 1982, following a bench trial, the district court issued a memorandum and order holding that petitioners had violated the Act's minimum wage, overtime, and recordkeeping provisions. 567 F. Supp. 556. The court ordered injunctive relief and awarded back wages to most of the testifying "outside workers" who were not associates of the Foundation,[3] but did not award back wages to any of the associates. *Id.* at 576. Instead, the court ordered the Secretary to mail a notice of the decision to all associates advising them to submit an affidavit if they wished to claim back wages. *Ibid.* Based on these affidavits, the Secretary was then to submit to the court a proposed finding of back wages due each associate, less the reasonable cost, as determined by the court, of each associate's board, lodging, and other benefits. *Id.* at 576-577.[4]

3. On appeal, the Eighth Circuit affirmed the district court as to liability, but reversed and remanded

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[3] The court of appeals affirmed the district court's determination that the associates who worked in the Foundation's commercial enterprises and the 18 "outside workers" were "employees" as defined by the FLSA. See *Donovan* v. *Tony and Susan Alamo Found.*, 722 F.2d 397, 404-405 (8th Cir. 1983); *Brock* v. *Tony and Susan Alamo Found.*, 842 F.2d at 1019.

[4] Sections 6 and 7 of the FLSA, 29 U.S.C. 206, 207, require that an employer pay employees covered by the Act a minimum hourly wage and overtime compensation for hours worked in excess of 40 per week. Under Section 3(m) of the Act, 29 U.S.C. 203(m), an employer may count as wages paid the "reasonable cost" of providing an employee with board, lodging, or other facilities, if such items are "customarily furnished" by the employer to his employees. See 29 C.F.R. 531.28. For each year at issue, the court calculated the amount of Section 3(m) benefits to be set off against back wages due each associate. 567 F. Supp. at 566-570.

as to the award of back wages. 722 F.2d 397 (1983). Citing this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the court of appeals held that the district court had improperly placed on the employees the burden of initiating proceedings to obtain payment of back wages. 722 F.2d at 404. The court remanded for a "determination of the amounts of wages owing, such determination to be based either upon the present record or as supplemented by such additional evidence as the District Court may afford the parties an opportunity to offer." 722 F.2d at 405.[5]

4. The district court entered a judgment on remand on November 26, 1986, App., *infra*, 20a-27a. It ordered the payment of back wages to most of the testifying associates, less Section 3(m) deductions in the amounts the court had previously determined.[6] The court concluded that these associates were entitled to compensation for at least 40 hours of work per week from January 1, 1976, until the injunction was entered in the case. App., *infra*, 23a-31a. The district court then dismissed without prejudice the Secretary's claims on behalf of the approximately 300 associates who did not testify. *Id.* at 22a.

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[5] On the Foundation's petition challenging the application of the Act to a religious institution on statutory and constitutional grounds, this Court granted certiorari and affirmed the holdings of the lower courts on these issues. 471 U.S. 290 (1985).

[6] The 1986 judgment incorporated a memorandum and order entered by the district court on September 11, 1984, App., *infra*, 12a-19a. The court awarded back wages to seven associates deposed by the Secretary, and to three associates who offered live testimony at trial. *Id.* at 23a. It failed to rule on back wages for two other associates who had been deposed, and for one remaining "outside worker."

5. Following a second appeal, the Eighth Circuit affirmed the district court's award of back wages, but again remanded for the district court to "estimate and fashion a reasonable remedy that restores as fully as possible all the employees covered by the FLSA who were improperly denied compensation, regardless of the lack of records." *Brock* v. *Tony & Susan Alamo Found.*, 842 F.2d 1018, 1019 (8th Cir. 1988).[7]

6. During further proceedings directed at establishing the amounts owed the non-testifying associates, the district court "ordered the Secretary to submit a proposed judgment 'reflecting an award for each [employee] identified by the [Foundation] and acknowledged as having worked in the [Foundation's] commercial businesses' based on the backpay awarded earlier to the testifying employees." Pet. App. 6-7, quoting App., *infra*, 3a. The Foundation objected to the Secretary's proposed judgment, contending that the amount of back wages should be based on the Foundation's own recently compiled estimates of the number of hours the employees had worked, and that the amounts proposed by the Secretary had not been offset by the Section 3(m) non-salary benefits. Pet. App. 7. The district court then ordered the Secretary to revise her proposed judgment in light of these objections. Pet. App. 7; App., *infra*, 1a-2a. Because

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[7] The court of appeals also ordered the lower court to make a specific finding as to the amount of wages due to one remaining "outside worker" and to two associates whose depositions the court had overlooked. 842 F.2d at 1020. On April 25, 1989, the district court entered a partial judgment awarding back wages and prejudgment interest to the "outside worker" and to the two associates based on the determination that the associates had worked 60 hours per week during the years in question. App., *infra*, 5a-11a. The Eighth Circuit affirmed that award. 915 F.2d 349 (1990).

the court found that, according to the Foundation's calculations, "no additional amounts [were] due," the court dismissed the claims with prejudice. Pet. App. 1.

7. Upon the Secretary's appeal, the Eighth Circuit again reversed, agreeing with the Secretary that "the district court failed to carry out [the] court's mandate by ordering the Secretary to base its proposed judgment on the Foundation's unsubstantiated approximations of the non-testifying employees' hours, rather than the Secretary's 'pattern or practice' evidence based on the hours the testifying employees worked." Pet. App. 7-8. The court noted that, throughout the lengthy course of the litigation, the Foundation had insisted that it had no record of the hours the associates worked. Nevertheless, in "a last-ditch attempt to subvert [the] court's earlier opinion," it had "belated[ly]" come forward with names of employees and a list of the hours that they had purportedly worked. *Id.* at 8. The court noted that its previous opinion reflected the district court's findings "that the Foundation maintained no employee work records and the Foundation's 'reconstructed' records were inaccurate." *Ibid.* It concluded that the Foundation was foreclosed "from attacking the Secretary's 'pattern or practice' evidence on remand with self-serving, unsubstantiated approximations of the hours its employees worked," *ibid.*, and that the district court erred in relying on the Foundation's submission.

The court rejected the Foundation's criticism of the Secretary's proposed method of calculating back wages. The court noted that, when an employer fails to keep records it is required to maintain under the FLSA, this Court has declared that the amount of damages awarded should be "based on the 'just and

reasonable inference' from the evidence presented." *Mt. Clemens Pottery*, 328 U.S. at 687. The court stated that "[w]e contemplated the district court awarding backpay to the nontestifying employees based on the fairly representative testimony of the testifying employees." Pet. App. 9. The court concluded that "the district court committed error in rejecting the Secretary's proposed judgment" based on representative employee testimony. *Ibid.* Finally, the court ruled that the Secretary's proposed judgment properly credited the Foundation for the meals and lodging that it had provided its employees. *Id.* at 9-10.

ARGUMENT

The court of appeals' decision involves the application of well-established principles to the specific facts of this case, and it does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is unwarranted.

1. The FLSA requires that covered employers pay their employees a statutorily prescribed minimum wage for all hours worked and a premium for hours worked in excess of 40 hours per week. 29 U.S.C. 206, 207. Additionally, the statute requires covered employers to maintain and provide to the Wage-Hour Administrator records concerning all employees and their wages, hours, and other conditions and practices of employment. 29 U.S.C. 211(c); see also 29 C.F.R. Pt. 516.

As this Court has recognized, if an employer keeps inadequate or inaccurate records, it is often impossible for an employee to prove the exact amount of back wages to which he is entitled. *Mt. Clemens Pottery Co.*, 328 U.S. at 687. Because the statutory duty of record-keeping lies with the employer, however, it

would defeat the Act's remedial purposes to require each worker to "prove the precise extent of uncompensated work" in order to receive wages due under the Act. Rather, the employee (or the Secretary of Labor on the employee's behalf [8]) "has carried out his burden if he proves that [the employee] has in fact performed work for which he was improperly compensated" and produces "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Ibid.* Once the employee or the Secretary has established the prima facie case in such a manner, "[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687-688.

In implementing *Mt. Clemens Pottery*, courts have not required all allegedly undercompensated employees to testify in order to establish entitlement to back wages. Rather, in the absence of adequate record-keeping, courts "have frequently granted back wages under the FLSA to non-testifying employees based upon the representative testimony of a small percentage of the employees. * * * The requirement is only that the testimony be fairly representational." *Donovan* v. *Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985) (citation omitted); see also *Donovan* v.

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[8] Although *Mt. Clemens* involved a suit brought directly by employees under Section 16(b) of the FLSA, petitioners do not deny that the Mt. Clemens standard applies to an action by the Secretary of Labor under Section 17 of the Act. Lower federal courts have uniformly applied *Mt. Clemens* in suits by the Secretary under the FLSA. See, *e.g.*, *McLaughlin* v. *Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989); *Donovan* v. *Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985).

New Floridian Hotel, Inc., 676 F.2d 468, 472 (11th Cir. 1982) ("[I]t is clear that each employee need not testify in order to make out a prima facie case of the number of hours worked as a matter of 'just and reasonable inference.'"); accord *McLaughlin* v. *Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989); *Donovan* v. *Simmons Petroleum Corp.*, 725 F.2d 83, 86 (10th Cir. 1983); *Donovan* v. *Burger King Corp.*, 672 F.2d 221, 224, 225 (1st Cir. 1982); *Brennan* v. *General Motors Acceptance Corp. (GMAC)*, 482 F.2d 825, 829 (5th Cir. 1973). The use of representative testimony is fully in keeping with *Mt. Clemens Pottery*: As the Court pointed out, barring recovery in the absence of precise proof of the exact amount of under-compensation would "place a premium on an employer's failure to keep proper records" and "penalize the employee" by allowing the noncompliant employer "to keep the benefits of the employee's labors." 328 U.S. at 687. Indeed, in *Mt. Clemens Pottery* itself, only eight out of 300 affected employees testified. See *Mt. Clemens Pottery Co.* v. *Anderson*, 149 F.2d 461, 462 (6th Cir. 1945).

Once a pattern or practice of underpayment is established by representative testimony, the burden shifts to the employer to undermine the conclusions drawn from the representative testimony. For example, the employer may rebut the existence or extent of the violations, *Mt. Clemens Pottery*, 328 U.S. at 687-688; *Castillo* v. *Givens*, 704 F.2d 181, 194 (5th Cir.), cert. denied, 464 U.S. 850 (1983), offer proof that individual employees are not included in the pattern or practice, *GMAC*, 482 F.2d at 829, or demonstrate that the testifying employees are not representative of the larger group. See, *e.g.*, Gov't Br. in Opp. at 11-13, *DialAmerica Marketing, Inc.* v. *Martin*, cert. denied, 112 S. Ct. 583 (1991).

2. Petitioners imply that an award of backpay to non-testifying associates would be improper because no proof was presented as to "the number of associates who worked in [the Foundation's] commercial business and the number of hours worked." Pet. 16. However, there is no longer a dispute as to the number of unpaid associates who worked in the Foundation's commercial enterprises in the years in question. Indeed, on August 22, 1990, the district court ordered the Secretary to submit a proposed judgment reflecting an award for "each associate identified by [petitioners] and acknowledged as having worked in the commercial businesses of the [petitioners]." App., *infra*, 3a. In other words, the Foundation itself identified these associates as having worked in its commercial enterprises. The Secretary submitted a proposed judgment requesting an award of back wages for only these associates.

Furthermore, there is no question that the Secretary established that none of the associates received cash compensation for the work performed. Therefore, the only issue before this Court is whether the court of appeals properly determined, as a matter of "just and reasonable inference," the number of hours for which the non-testifying employees were entitled to compensation.

Petitioners contend (Pet. 16-17) that the Secretary presented no evidence as to the number of hours that the non-testifying associates worked, but instead asked the district court to award back wages to these associates "based on assumptions only." Pet. 20 This contention is in error. The court of appeals had previously ordered the district court to calculate a back wages award based on evidence in the record, "supplemented by * * * additional evidence" if necessary. 722 F.2d at 405. The district court subse-

quently concluded, App., *infra*, 23a-31a, that the unrebutted testimony and depositions of 12 associates established that those associates worked 40-84 hours a week in the Foundation's commercial enterprises during the years in question. Based on the "just and reasonable" assumption that the testimony was representative of the work patterns of the non-testifying associates, the Secretary ultimately requested that awards to the non-testifying associates be based on a work week of 40 hours, the minimum number of hours found to have been worked by any testifying associate.

Petitioners do not challenge the well-established principle that *Mt. Clemens Pottery* allows district courts to award back wages under the FLSA to non-testifying employees based upon the fairly representative testimony of a smaller group of employees.[9] Nor do petitioners succeed in undermining the Secretary's premise, which the court of appeals found reasonable,

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[9] See *Ho Fat Seto*, 850 F.2d at 589; see also *Dole* v. *Snell*, 875 F.2d 802, 803 (10th Cir. 1989) (testimony of one representative employee established violations concerning 32 employees); *Castillo*, 704 F.2d at 195 (testimony of 13 representative employees established uncompensated hours for 39 employees); *Burger King Corp.*, 672 F.2d at 224-225 (employees from six locations established a pattern of violation for 44 locations in two states); *New Floridian Hotel*, 676 F.2d at 472 (testimony of 23 employees, together with other supporting evidence, established prima facie case for back pay award to 151 employees); *GMAC*, 482 F.2d at 829 (testimony of 16 out of 26 employees); *McLaughlin* v. *DialAmerica Marketing, Inc.*, 716 F. Supp. 812, 827 (D.N.J. 1989) (testimony of 43 out of 393 employees) aff'd, 935 F.2d 1281 (3d Cir.), cert. denied, 112 S. Ct. 583 (1991); but see *Secretary of Labor* v. *DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991) (testimony of one employee found insufficiently representative to support award to 244 employees).

see Pet. App. 9, that the 12 testifying associates were "fairly representative" of the larger group of associates that worked in the Foundation's commercial enterprises. Under *Mt. Clemens*, however, it is up to petitioners to rebut the reasonableness of the inference that the hours and patterns of work of the testifying associates were typical of the group as a whole. This petitioners have failed to do. Petitioners suggest that, instead of relying on representative testimony, the district court should base its backpay calculation on information provided by the Foundation itself. See Pet. 20-21. However, the court of appeals concluded, based on the district court's own "findings that the Foundation maintained no employee work records and the Foundation's 'reconstructed' records were inaccurate," that petitioners' submission was far less reliable than the Secretary's "pattern or practice" evidence, and could not be used to undermine the Secretary's proposed award. Pet. App. 8; see also *Donovan* v. *Grantham*, 690 F.2d 453, 458 (5th Cir. 1982) (in order to rebut Secretary's calculations of wages owed, employer's "evidence must be as precise as that offered by the Secretary").[10]

In any event, petitioners cannot complain that the use of representative testimony results in only an approximate calculation of the backpay actually due, since any imprecision is directly attributable to petitioner's failure to maintain appropriate records.

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[10] Although petitioners do not challenge the awards previously made by the court to the testifying associates, they suggest that the testimony of three of these associates (Pet. 18-20) indicates that these associates did not work any compensable hours in the Foundation's commercial enterprises. The district court found otherwise, however, concluding that each of these associates worked 40 hours a week during the years in question. App., *infra*, 30a-31a.

"The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements * * * of the Act." *Mt. Clemens Pottery*, 328 U.S. at 688. See *Brock* v. *Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986) ("*Mt. Clemens Pottery* leaves no doubt that an award of back wages will not be barred for imprecision where it arises from the employer's failure to keep records as required by the FLSA."); *Beliz* v. *W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1330-1331 (5th Cir. 1985) ("Because precise evidence of the hours worked by each individual is not available due to the failure of [the employer] to keep adequate records, the workers may satisfy their burden with admittedly inexact or approximate evidence.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MARSHALL J. BREGER
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor

ELIZABETH HOPKINS
Attorney
Department of Labor

JUNE 1992

APPENDIX

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

Civil No. 77-2183

ELIZABETH DOLE, Secretary of Labor,
U.S. Department of Labor, PLAINTIFF

v.

TONY AND SUSAN ALAMO FOUNDATION, ET AL.,
DEFENDANTS

ORDER

NOW on this ninth day of October, 1990, comes on for consideration the plaintiff's proposed judgment, submitted to the court on September 13, 1990. And the defendants responded with objections and comments by letter dated September 28, 1990.

IT APPEARING to the court that the proposed judgment should be revised in light of the defendants' comments, it is ORDERED that the plaintiff submit a revised proposed judgment as to the associates identified as having worked in the commercial businesses of the defendants, reflecting a wage computation based on the hours listed for each of those associates in the commercial businesses, as specified by the defendants' answers to the plaintiff's interrogatories.

It is further ORDERED that the gross wage amounts are to be offset by the amounts previously found by the court to be allocable to the benefits provided to those associates, that is, $225.03/month for 1976, $174.06/month for 1977, $225.30/month for 1978, $240.60/month for 1979, $269.92/month for 1980, and $306.38/month for 1981.

It is further ORDERED that the plaintiff submit the revised proposed judgment, along with proposed assessments for interest or other appropriate additions to the basic amounts, on or before October 26, 1990, and that the plaintiff provide the defendants with a copy of the revised proposed judgment. It is further ORDERED that the defendants may have until and including November 9, 1990, to comment to the court on the plaintiff's revised proposed judgment. The court notes that the additional two months necessitated by this revision of the judgment could have been avoided if the defendants had included their comments about the specific hours worked for each associate in their original response to the plaintiff's motion for entry of judgment instead of waiting until after the plaintiff had prepared her proposed judgment.

/s/ Morris S. Arnold
HON. MORRIS S. ARNOLD
United States District Judge

[Filed Oct. 9, 1990]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

Civil No. 77-2183

ELIZABETH DOLE, Secretary of Labor,
U.S. Department of Labor, PLAINTIFF

vs.

TONY AND SUSAN ALAMO FOUNDATION, ET AL.,
DEFENDANTS

ORDER

NOW on this twentieth day of August, 1990, comes on for consideration the plaintiff's Motion for Entry of Judgment, filed on July 30, 1990, in the above-styled cause. And the defendants filed a response on August 2, 1990.

IT APPEARING to the court that the plaintiff's motion should be granted in part, it is ORDERED that the plaintiff prepare and submit to the court a proposed judgment reflecting an award for each associate identified by the defendants and acknowledged as having worked in the commercial businesses of the defendants (*see* Exhibits A-F to plaintiff's motion), that award being in the amount of $1875.64 for 1976 associates, $2695.28 for 1977 associates, $2808.40 for 1978 associates, $3144.80 for 1979 associates, $3208.96 for 1980 associates, and $822.86 for 1981 associates,

and the full amount of that award being assessed for each associate listed as having worked the full year, and a pro rata amount of that award being assessed for each associate listed as having worked a partial year.

It is further ORDERED that the plaintiff submit the proposed judgment, along with proposed assessments for interest or other appropriate additions to the basic amounts, on or before September 14, 1990, and that the plaintiff provide the defendants with a copy of the proposed judgment. It is further ORDERED that the defendants may have until and including September 28, 1990, to comment to the court on the plaintiff's proposed judgment.

/s/ Morris S. Arnold
HON. MORRIS S. ARNOLD
United States District Judge

[Filed Aug. 22, 1990]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

Civil Action No. 77-2183

ELIZABETH DOLE, Secretary of Labor,
United States Department of Labor, PLAINTIFF

v.

TONY AND SUSAN ALAMO FOUNDATION, ET AL.,
DEFENDANTS

PARTIAL JUDGMENT

In accordance with the memorandum opinion and order entered herein on April 25, 1989, it is hereby

ORDERED, ADJUDGED and DECREED that defendants Tony and Susan Alamo Foundation and Tony Alamo and their agents, servants, employees and all persons in active concert or participation with them be and they hereby are permanently enjoined and restrained from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*, hereinafter referred to as the Act, in any of the following manners:

A. Defendants Tony and Susan Alamo Foundadation and Tony Alamo shall not, contrary to Sections 6 and 15(a)(2) of the Act, 29 U.S.C. §§ 206 and 215(a)(2), pay any employee who is engaged in commerce or in the production of goods for commerce,

or who is employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, wages at a rate of less than the minimum hourly rates required by Section 6 of the Act.

B. Defendants Tony and Susan Alamo Foundation and Tony Alamo shall not, contrary to Sections 7 and 15(a)(2) of the Act, 29 U.S.C. §§ 207 and 215 (a)(2), employ an employee in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for workweeks longer than forty (40) hours, unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not less than one and one-half times the regular rate at which he is employed.

C. Defendants Tony and Susan Alamo Foundation and Tony Alamo shall not, contrary to Sections 11(c) and 15(a)(5) of the Act, 29 U.S.C. §§ 211(c) and 215(a)(5), fail to make, keep and preserve adequate and accurate records of the persons employed by them, and the wages, hours and other conditions and practices of employment maintained by them as prescribed by regulations issued by the Administrator of the Employment Standards Administration, United States Department of Labor (29 C.F.R. Part 516).

It is further ORDERED, ADJUDGED and DECREED that defendants Tony and Susan Alamo Foundation and Tony Alamo be, and they hereby are, enjoined and restrained from withholding payment of minimum wages and overtime compensation in the total amount of $31,802.74 which the Court finds is due under the Act to their employees named in the

Summary of Unpaid Wages attached hereto in the amounts stated thereon, together with prejudgment interest thereon in the amount of $26,867.47 calculated in accordance with 26 U.S.C. § 6621 from the median dates of withholding to June 1, 1989. It is further

ORDERED, ADJUDGED and DECREED that, in order to comply with the foregoing provisions of this judgment, defendants Tony and Susan Alamo Foundation and Tony Alamo shall deliver to plaintiff, within ten (10) days from the date of entry of this judgment, a cashier's check payable to "Employment Standards Administration, United States Department of Labor" in the amount of $58,670.21. It is further

ORDERED, ADJUDGED and DECREED that, as soon as practicable after this receipt of the aforesaid cashier's check, plaintiff shall distribute the proceeds thereof to the employees named on the Summary of Unpaid Wages attached hereto in the amounts stated thereon less social security and income tax deductions. Any net sums which have not been distributed within 3 years after plaintiff's receipt of the aforesaid cashier's check because of plaintiff's inability to locate the proper persons or because of a refusal to accept such sums, shall be deposited with the Clerk of the Court who forthwith shall deposit such sums with the Treasurer of the United States pursuant to 28 U.S.C. § 2041. It is further

ORDERED, ADJUDGED and DECREED that all demands for relief and claims asserted by plaintiff on behalf of the present and former employees, also known as associates, of the Tony and Susan Alamo Foundation that were not granted in the court's order

filed on November 26, 1986, or in this order are still considered to be pending before the court.

SIGNED this 30th day of May, 1989.

/s/ Morris S. Arnold
HON. MORRIS S. ARNOLD
United States District Judge

[Filed May 30, 1989]

SUMMARY OF UNPAID WAGES

Name	Amount	Median Date of Withholding	Rate of Interest	Number of Years to 06/01/89	Prejudgment Interest	Total
Donald Wylie	$14,545.42	Sat. 3/19/77	7%	12.255	$12,477.79	$27,023.21
Kathy Wylie	14,545.42	Sat. 3/19/77	7%	12.255	12,477.79	27,023.21
A.Z. Hudson	2,711.90	Sat. 9/01/79	6%	11.750	1,911.89	4,623.79
	$31,802.74				$26,867.47	$58,670.21

COMPUTATION OF COMPENSATION DUE TO DONALD WYLIE AND KATHY WYLIE

Year	Compensation Required	Weekly Hours Worked	Weeks Per Year	Gross Compensation Due	Cost of Facilities Furnished	Net Compensation Due
1976	$2.20(mw)	60	52	$ 6,864.00	$2,700.36[1]	$ 5,307.64
	1.10(ot)	20	52	1,144.00		
				$ 8,008.00		
1977	2.30(mw)	60	52	7,176.00	2,088.72[2]	6,283.28
	1.15(ot)	20	52	1,196.00		
				$ 8,372.00		
1978	2.65(mw)	60	22	3,498.00	1,126.50[3]	2,954.50
	1.325(ot)	20	22	583.00		
				$ 4,081.00		
		TOTAL		$20,461.00	$5,915.58	$14,545.42

[1] $225.03 per month x 12 months = $2,700.36

[2] $174.06 per month x 12 months = $2,088.72

[3] $225.30 per month x 5 months = $1,126.50

COMPUTATION OF OVERTIME COMPENSATION DUE TO A.Z. HUDSON

May 1979	
1 week x 10 hours per week x $3.335 per hour	$ 33.35
1 week x 20 hours per week x $3.335 per hour	66.70
June 1979	
2 weeks x 20 hours per week x $4.585 per hour	183.40
1 week x 20 hours per week x $5.000 per hour	100.00
June 29 through December 1979	
65 weeks x 60 hours per week x $5.415 per hour	2,111.85
4 weeks x 10 hours per week x $5.415 per hour	216.60
TOTAL	$2,711.90

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. CIV 77-2183

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

vs.

TONY AND SUSAN ALAMO FOUNDATION, ET AL.,
DEFENDANTS

MEMORANDUM AND ORDER

This case is now seven years old. It is presently on remand because the Court of Appeals concluded the remedy portion of the decision was in error. See, *Donovan v. Tony and Susan Alamo Foundation*, 722 F.2d 397 (8th Cir. 1983).

Specifically, the Court of Appeals said:

> "—we conclude that the District Court's proposed procedure requiring 'associates' to initiate proceedings to obtain payment of amounts due them does not comport with the policy of the statute. It would place on the employee a burden properly falling upon the employer." *Id.* at 403.

The Secretary has not asked for the opportunity to submit additional evidence which is, of course, consistent with the position taken at the several hearings conducted before the original decision was made. The Secretary has consistently argued that this court should assume that all "associates" of the Foundation

are also full time employees of the Foundation's commercial enterprises. For example, the Secretary argued that in 1976 there were 316 "associates" of the Foundation, and this court should award an amount which will compensate all 316 for sixty hours work per week. During the course of the hearings, this court repeatedly told the Secretary's attorneys that there was no evidentiary basis for concluding that all associates were full time employees of the commercial businesses. Specifically, this court concluded:

> First, there is no basis for concluding, as the Secretary suggests, that all 300 of the associates worked in the Foundation's commercial businesses. To the contrary, the evidence reflects that the associates have constructed, decorated and furnished a number of residences, an apartment building, a church, and various other structures used by the Foundation and its associates for non-commercial purposes. The labor for much of this construction and the continuing maintenance of the structures was furnished by the associates. As previously mentioned, some associates work at the Foundation in non-commercial jobs, such as babysitting at the nursery, cooking for the other associates, etc. Furthermore, the Foundation produces a television show which obviously requires some non-commercial work time; some associates "witness" on the street, in hospitals, jails and other places; and some help organize new churches. Additionally, some associates are employees of businesses other than the Foundation's and simply turn their paychecks over to the Foundation. In any event, while it is difficult to reach any reasonably accurate conclusion as to how many associates work

> in the commercial businesses at any particular time, it is not reasonable to conclude that all of the adult associates are working in the commercial businesses, or, that the ones who do work in the commercial businesses do so on the regular basis suggested by the Secretary.

Donovan v. Tony and Susan Alamo Foundation, 567 F.Supp. 556, 563 (W.D. Ark. 1982).

While this court is aware of the decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the language of that case does not solve the problem. A threshold burden on the claimant imposed by *Mt. Clemens Pottery Co.* is the requirement that the worker establish his status as an "employee". This threshold requirement is noted by the Court of Appeals in the following language:

> "—we hold that an employee has carried out his burden *if he proves that he has in fact performed work for which he was improperly compensated* and if he produces sufficient evidence to show the amount and extent of the work as a matter of just and reasonable inference." (Emphasis added.) 328 U.S. at 687-88.

The Secretary chose to treat this claim in the manner of a "class action". A few former associates of the Foundation testified that they worked in the Foundation's commercial businesses and they described generally the hours they worked. They also testified that other, generally unidentified, associates worked similar hours. Based upon such testimony, the Secretary argued that *all* associates should be compensated at the rate of 60 hours per week. This court did not accept that argument. Under the evidence, the term "associate" simply cannot be used

interchangeably with the term "employee" under the Act.

For example, William John Baxter, a former "associate", testified that from January 1, 1976, through March, 1977, he worked in various commercial businesses operated by the Foundation at Alma, Arkansas, and Nashville, Tennessee. In March, 1977, he said he "worked on the chapel" at Alma. From October, 1977, through the spring of 1978, he worked for Planters Peanut Company and Ayers Furniture Company in Fort Smith. He was paid by those two employers and "donated" his check to the Foundation. There is nothing in the Act, or cases decided under the Act, which leads this court to believe that Mr. Baxter should be treated as an "employee" of the Foundation for the time he "worked on the chapel" or the time he was employed by Planters Peanut Company and Ayers Furniture Company. If a person wants to donate his paycheck to a religious organization, nothing in the Fair Labor Standards Act suggests that he be treated as an employee of the organization because of that donation.

The remedy procedure devised by this court was not calculated to shift any burden to the employee. Its purpose was simply to identify those associates who worked in commercial businesses and the time periods covered by their work. Such a procedure is routinely used in the remedy phase of class action employment cases under Title VII.

Nevertheless, and since the remedy procedure originally ordered in this case has been disapproved, the court will look to the record in order to identify those "associates" who were employees of the Foundation's commercial businesses and who were not compensated for their work. The following associates are entitled

to such compensation as provided by the Act, less the value of "benefits" received from the Foundation during the period for which compensation is awarded.

(1) *Lucien Claude*—Mr. Claude was an associate of the Foundation for seven and one-half years. The relevant time period is January 1, 1976, until he left the Foundation on May 23, 1979. He testified by deposition that he worked some jobs and turned his paycheck over to the Foundation. At other times, he worked for Foundation businesses and was not paid. Although the testimony is vague and general, there is no doubt Mr. Claude "performed work for which he was improperly compensated". He is awarded such sums as required by the Act to compensate him for 40 hours per week from January 1, 1976, through May 23, 1979.

(2) *Ralph Malone*—Mr. Malone was an associate of the Foundation during the period from January 1, 1976, until he left on April 1, 1978. Apparently he spent some of his time "cooking for people at the church" and acting as a driver of an "agent" of the Foundation. How such efforts are compensable under the Act was not explained by the Secretary. Nevertheless, the evidence supports an inference that Mr. Malone worked in a number of Foundation businesses beginning in August, 1976, until he left the Foundation. He is awarded such sums as required by the Act to compensate him for 60 hours per week from August 1, 1976, until April 1, 1979.

(3) *Debra Malone*—Mrs. Malone was an "associate" who worked in the sewing room and as a waitress at the Foundation's restaurant. The evidence supports an inference that she worked 60 hours per week from January 1, 1976, through April 1, 1976, and was not properly compensated.

(4) *Lane Louise Petri*—Mrs. Petri worked an average of 44 hours per week from January 1, 1976, through March 7, 1976. She is entitled to compensation as provided by the Act.

(5) *William John Baxter*—Mr. Baxter is entitled to compensation provided under the Act for 60 hours per week during the following time periods:

January 1, 1976, until March 1, 1977
May 1, 1978, until August 16, 1978.

He will not be awarded any compensation for the time he "worked on the chapel" or worked for outside employers and "donated" his paycheck to the Foundation.

(6) *Richard T. Hidell*—Mr. Hidell joined the Foundation in January, 1976. He worked 12 hours a day, six days a week, in various commercial businesses until he left the Foundation in August, 1978, except for one two month period that he worked 12 hours a day, seven days a week. He began as a buyer in California for the Foundation businesses and then moved to Arkansas where he worked for the construction company, the nursery and the roofing company. During the two month period, he worked as a maitre

> d' in the restaurant. He is awarded such sums as required by the Act to compensate him for a period from January 1, 1976, to August 31, 1978, at a rate of 12 hours a day, six days a week, except for eight weeks at 12 hours a day for seven days a week during 1976.

Four other "associates" of the Foundation testified at the hearings in behalf of the Foundation. Although they vehemently denied they were entitled to any compensation for their work in the Foundation's commercial enterprises, the evidence supports an inference that William R. Levy, Ann Elmore, Larry La Roche and Edward Mick performed work for which they were improperly compensated. Ann Elmore, Larry La Roche and Edward Mick are entitled to compensation for 40 hours per week from January 1, 1976, until the order of injunctive relief was entered. William R. Levy is entitled to compensation for 40 hours per week from June 1, 1979, until the order of injunctive relief was entered.

There were, no doubt, other "associates" of the Foundation who performed work for which they were not properly compensated under the Act. This Court does not believe, however, that there is credible evidence upon which to base an inference as to the identity of those associates, the time period which they worked, or the compensation they are due. Absent some reasonable basis in the evidence for such findings, this court is not willing to award the $15,000,000 or so in benefits sought by the Secretary. In any event, this court has made all the factual findings believed possible with this record.

The Secretary is hereby ordered to submit a proposed judgment within 15 days which reflects the

sums due each employee under the Act for the periods covered by the awards, less the value of any "benefits" afforded the employees during the periods for which compensation is due. The "benefits" are to be determined from the schedules of benefits found in the Memorandum Order filed December 13, 1982.

The claims asserted by the Secretary in behalf of associates of the Foundation who are not specifically granted relief as part of this order or previous orders of this court are dismissed without prejudice.

September 10, 1984

/s/ [Illegible]
United States District Judge

[Filed Sep. 11, 1984]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

Civil No. 77-2183

WILLIAM E. BROCK, Secretary of Labor,
United States Department of Labor, PLAINTIFF

v.

TONY AND SUSAN ALAMO FOUNDATION, ET AL.,
DEFENDANTS

JUDGMENT

In accordance with the memorandum and order entered herein on September 11, 1984, as amended, it is hereby ORDERED, ADJUDGED, AND DECREED that defendants Tony and Susan Alamo Foundation and Tony Alamo and their agents, servants, employees, and all persons in active concert or participation with them be, and they are hereby, permanently enjoined and restrained from violating the minimum wage, overtime, and record-keeping provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 215(a)(2), 215(a)(5), hereinafter referred to as the Act, in any of the foregoing manners:

A. Defendants Tony and Susan Alamo Foundation and Tony Alamo shall not, contrary to 29 U.S.C. §§ 206 and 215(a)(2), pay any employee who is engaged in commerce or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce, or in the production of goods for commerce within the meaning of the Act, wages at a rate less than the minimum hourly rates required by Section 6 of the Act, 29 U.S.C. § 206.

B. Defendants Tony and Susan Alamo Foundation and Tony Alamo shall not, contrary to 29 U.S.C. §§ 207 and 215(a)(2), employ any employee in commerce or in the production of goods for commerce, within the meaning of the Act, for workweeks longer than forty hours, unless the employee receives compensation for his employment in excess of forty hours at a rate not less than one and one-half times the regular rate at which he is employed.

C. Defendants Tony and Susan Alamo Foundation and Tony Alamo shall not, contrary to 29 U.S.C. §§ 211(c) and 215(a)(5), fail to make, keep, and preserve adequate and accurate records of the persons employed by them, and the wages, hours, and other conditions and practices of employment maintained by them, as prescribed by regulations issued by the Administrator of the Employment Standards Administration, United States Department of Labor (29 C.F.R. Part 516).

It is further ORDERED, ADJUDGED, AND DECREED that defendants Tony and Susan Alamo Foundation and Tony Alamo be, and they are hereby, enjoined and restrained from withholding payment of minimum wages and overtime compensation in the total amount of $113,636.94 that the court finds is due under the Act to the employees named in the Summary of Unpaid Wages attached hereto in the amounts stated thereon, together with prejudgment interest thereon in the amount of $69,359.20 calculated in accordance with 26 U.S.C. § 6621 from the median dates of withholding to December 1, 1986.

It is further ORDERED, ADJUDGED, AND DECREED that, in order to comply with the foregoing provisions of this judgment, defendants Tony and Susan Alamo Foundation and Tony Alamo shall de-

liver to plaintiff, within fourteen days from the date of entry of this judgment, a cashier's check payable to "Employment Standards Administration, United States Department of Labor" in the amount of $182,996.14.

It is further ORDERED, ADJUDGED, AND DECREED that as soon as practicable after receipt of the aforesaid cashier's check, plaintiff shall distribute the proceeds thereof to the employees named on the Summary of Unpaid Wages attached hereto in the amounts stated thereon less social security and income tax deductions. Any net sums that have not been distributed within three years after plaintiff's receipt of the aforesaid cashier's check because of plaintiff's inability to locate the proper persons or because of a refusal to accept such sums shall be deposited with the Clerk of this Court, who forthwith shall deposit such sums with the Treasurer of the United States pursuant to 28 U.S.C. § 2041.

It is further ORDERED, ADJUDGED, AND DECREED that all demands for relief and claims asserted by plaintiff on behalf of the present and former employees, also known as associates, of the Tony and Susan Alamo Foundation that are not granted herein be, and are hereby, denied and dismissed without prejudice.

SIGNED this 25th day of November, 1986.

/s/ Morris S. Arnold
HON. MORRIS S. ARNOLD
United States District Judge

[Filed Nov. 26, 1986]

SUMMARY OF UNPAID WAGES

Name	Amount	Median Date of Withholding	Rate of Interest	Number of Years to Dec. 1, 1986	Prejudgment Interest	Total
Lucien Claude	$ 8,625.14	Sat., Sep. 10, 1977	7%	9.225	$ 5,569.68	$ 14,194.00
Debra Malone	13,843.22	Wed., Mar. 2, 1977	7%	9.751	9,448.97	23,292.00
Ralph Malone	10,798.43	Wed., June 15, 1977	7%	9.463	7,152.99	17,951.00
Lane L. Petri	492.70	Sat., Jan. 31, 1976	9%	10.833	480.37	973.00
William J. Baxter	8,143.41	Wed., Apr. 27, 1977	7%	9.597	5,470.66	13,614.00
Richard T. Hydell	22,462.00	Sat., Apr. 30, 1977	7%	9.589	15,077.17	37,539.00
William R. Levy	5,604.22	Wed., Apr. 30, 1980	12%	6.589	4,431.14	10,035.00
Ann Elmore	14,555.94	Wed., Aug. 16, 1978	6%	8.293	7,242.74	21,798.00
Larry LaRoche	14,555.94	Wed., Aug. 16, 1978	6%	8.293	7,242.74	21,798.00
Edward Mick	14,555.94	Wed., Aug. 16, 1978	6%	8.293	7,242.74	21,798.00
TOTAL	$113,636.94				$69,359.20	$182,996.00

COMPUTATION OF COMPENSATION DUE LUCIEN CLAUDE

Year	Compensation Required	Weekly Hours Worked	Yearly Weeks Worked	Gross Compensation Due	Cost of Facilities Furnished	Net Compensation Due
1976	$2.20	40	52	$ 4,576.00	$2,700.36[1]	$1,875.64
1977	2.30	40	52	4,784.00	2,088.72[2]	2,695.28
1978	2.65	40	52	5,512.00	2,703.60[3]	2,808.40
1979	2.90	40	20.6	2,389.60	1,143.78[4]	1,245.82
				$17,261.60	$8,636.46	$8,625.14

[1] $225.03 per month x 12 months = $2,700.36

[2] $174.06 per month x 12 months = $2,088.72

[3] $225.30 per month x 12 months = $2,703.60

[4] $240.60 per month x 12 months = $2,887.20

$2,887.20 per year ÷ 52 weeks per year = $55.523 per week
$55.523 per week x 20.6 weeks = $1,143.78

COMPUTATION OF COMPENSATION DUE TO DEBRA MALONE

Year	Compensation Required	Weekly Hours Worked	Yearly Weeks Worked	Gross Compensation Due	Cost of Facilities Furnished	Net Compensation Due
1976	$2.20(mw)	60	52	$ 6,864.00	$2,700.36[1]	$ 5,307.00
	1.10(ot)	20	52	1,144.00		
				$ 8,008.00		
1977	$2.30(mw)	60	52	$ 7,176.00	$2,088.72[2]	6,283.00
	1.15(ot)	20	52	1,196.00		
				$ 8,372.00		
1978	$2.65(mw)	60	17	$ 2,703.00	$ 901.20[3]	2,252.00
	1.325(ot)	20	17	450.00		
				$ 3,153.50		
		TOTAL		$19,533.50	$5,690.28	$13,843.00

[1] $225.03 per month x 12 months = $2,700.36

[2] $174.06 per month x 12 months = $2,088.72

[3] $225.30 per month x 4 months = $901.20

COMPUTATION OF COMPENSATION DUE TO LANE LOUIS PETRI

Year	Compensation Required	Weekly Hours Worked	Yearly Weeks Worked	Gross Compensation Due	Cost of Facilities Furnished	Net Compensation Due
1976	$2.20(mw)	44	10	$ 968.00	$519.30[1]	$492.70
	1.10(ot)	4	10	44.00		
				$1,012.00		

[1] $225.03 per month x 12 months = $2,700.36
$2,700.36 per year ÷ 52 weeks per year = $51.93 per week
$51.93 per week x 10 weeks — $519.30

COMPUTATION OF COMPENSATION DUE TO RALPH MALONE

Year	Compensation Required	Weekly Hours Worked	Yearly Weeks Worked	Gross Compensation Due	Cost of Facilities Furnished	Net Compensation Due
1976	$2.20(mw)	60	22	$ 2,904.00	$1,125.15[1]	$ 2,262.80
	1.10(ot)	20	22	484.00		
				$ 3,388.00		
1977	$2.30(mw)	60	52	$ 7,176.00	$2,088.72[2]	$ 6,283.20
	1.15(ot)	20	52	1,196.00		
				$8,372.00		
1978	$2.65(mw)	60	17	$ 2,703.00	$ 901.20[3]	$ 2,252.30
	1.325(ot)	20	17	450.00		
				$ 3,153.50		
		TOTAL		$14,913.50	$4,115.07	$10,798.40

[1] $225.03 per month x 5 months = $1,125.15

[2] $174.06 per month x 12 months = $2,088.72

[3] $225.30 per month x 4 months = $ 901.20

COMPUTATION OF COMPENSATION DUE TO WILLIAM JOHN BAXTER

Year	Compensation Required	Weekly Hours Worked	Yearly Weeks Worked	Gross Compensation Due	Cost of Facilities Furnished	Net Compensation Due
1976	$2.20(mw)	60	52	$ 6,864.00	$2,700.36[1]	$5,307.00
	1.10(ot)	20	52	1,144.00		
				$ 8,008.00		
1977	$2.30(mw)	60	8	$ 1,104.00	321.34[2]	966.00
	1.15(ot)	20	8	184.00		
				$ 1,288.00		
1978	$2.65(mw)	60	14	$ 2,226.00	727.89[3]	1,869.00
	1.325(ot)	20	14	371.00		
				$ 2,597.00		
	TOTAL			$11,893.00	$3,749.59	$8,143.00

[1] $225.03 per month x 12 months = $2,700.36 per year

[2] $174.06 per month x 12 months = $2,088.72 per year
$2,088.72 per year ÷ 52 weeks per year — $40.168 per week
$40.168 per week x 8 weeks = $321.34

[3] $225.30 per month x 12 months = $2,703.60 per year
$2,703.60 per year ÷ 52 weeks per year = $51.992 per week
$51.922 per week x 14 weeks = $727.89

COMPUTATION OF COMPENSATION DUE TO RICHARD T. HYDELL

Year	Compensation Required	Weekly Hours Worked	Yearly Weeks Worked	Gross Compensation Due	Cost of Facilities Furnished	Net Compensation Due
1976	$2.20(mw)	84	8	$ 1,478.40	$ 415.44[1]	$ 1,450.00
	1.10(ot)	44	8	387.00		
				$ 1,865.60		
1976	$2.20(mw)	72	44	$ 6,969.60	$2,284.92[2]	$ 6,233.00
	1.10(ot)	32	44	1,548.80		
				$ 8,518.40		
1977	$2.30(mw)	72	52	$8,611.20	$2,088.72[3]	$ 8,436.00
	1.15(ot)	32	52	1,913.60		
				$10,524.80		
1978	$2.65(mw)	72	35	$ 6,678.00	$1,819.72[4]	$ 6,342.00
	1.325(ot)	32	35	1,484.00		
				$ 8,162.00		
		TOTAL		$29,070.80	$6,608.80	$22,462.00

[1] $225.03 per month x 12 months = $2,700.36
$2,700.36 per year ÷ 52 weeks per year = $51.93 per week
$51.93 per week x 8 weeks — $415.44

[2] $225.30 per month x 12 months = $2,700.36 per year
$2,700.36 per year ÷ 12 months per year = $51.93 per week
$51.93 per week x 44 weeks = $2,284.92

[3] $174.06 per month x 12 months per year = $2,088.72

[4] $225.30 per month x 12 months per year = $2,703.60 per year
$2,703.60 per year ÷ 52 weeks per year = $51.992 per week
$51.992 per week x 35 weeks = $1,819.72

COMPUTATION OF COMPENSATION DUE TO WILLIAM R. LEVY

Year	Compensation Required	Weekly Hours Worked	Yearly Weeks Worked	Gross Compensation Due	Cost of Facilities Furnished	Net Compensation Due
1979	$2.90	40	26	$ 3,016.00	$1,443.60[1]	$1,572.00
1980	$3.10	40	52	$ 6,448.00	$3,239.04[2]	$3,208.00
1981	$3.35	40	13	$ 1,742.00	$ 919.14[3]	$ 822.00
			TOTAL	$11,206.00	$5,601.78	$5,604.00

[1] $240.60 per month x 12 months per year = $2,887.20 per year
$2,887.20 per year ÷ 52 weeks per year = $55.523 per week
$55.523 per week x 26 weeks = $1,443.60

[2] $269.92 per month x 12 months per year = $3,239.04

[3] $306.38 per month x 3 months per year = $919.14

COMPUTATION OF COMPENSATION DUE TO ANN ELMORE, LARRY LA ROCHE, AND EDWARD MICK

Year	Compensation Required	Weekly Hours Worked	Yearly Weeks Worked	Gross Compensation Due	Cost of Facilities Furnished	Net Compensation Due
1976	$2.20	40	52	$ 4,576.00	$ 2,700.36[1]	$ 1,875.00
1977	$2.30	40	52	$ 4,784.00	$ 2,088.72[2]	$ 2,695.00
1978	$2.65	40	52	$ 5,512.00	$ 2,703.60[3]	$ 2,808.00
1979	$2.90	40	52	$ 6,032.00	$ 2,887.20[4]	$ 3,144.00
1980	$3.10	40	52	$ 6,448.00	$ 3,239.04[5]	$ 3,208.00
1981	$3.35	40	13	$ 1,742.00	$ 919.14[6]	$ 822.00
		TOTAL		$29,094.00	$14,538.06	$14.555.00

[1] $225.03 per month x 12 months per year = $2,700.36

[2] $174.06 per month x 12 months per year = $2,088.72

[3] $225.30 per month x 12 months per year = $2,703.60

[4] $240.60 per month x 12 months per year = $2,887.20

[5] $269.92 per month x 12 months per year = $3,239.04

[6] $306.38 per month x 3 months per year = $ 919.14

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